

## Internal Revenue Service

Number: **202146004**

Release Date: 11/19/2021

Index Number: 853.00-00, 853.01-00,  
9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B02

PLR-105312-21

Date:

August 23, 2021

### Legend:

Taxpayer =

Manager =

Contractor =

Agent =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

a =

Dear :

This ruling responds to a letter dated March 4, 2021 submitted on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election under section 853(a) of the Internal Revenue Code (the "Code") for the taxable year ended Date 1.

### FACTS

Taxpayer is a publicly traded regulated investment company ("RIC") formed on Date 2. Taxpayer's overall strategy is to build a broadly diversified portfolio of debt instruments to help moderate the special risks of investing in high yield bonds and foreign securities. Generally, Taxpayer invests at least a percent of its net assets in securities issued by governments or companies that are organized or located outside the United States or doing a substantial amount of business outside the United States. Taxpayer uses an accrual method of accounting for U.S. federal income tax purposes and has a taxable year ending Date 3.

Taxpayer does not employ management or tax advisory personnel directly but contracts with Manager to provide such services, which include evaluating whether Taxpayer should make the annual section 853(a) election. Manager also performs such services for other RICs in the group of companies and funds that includes Taxpayer ("Company Group"). It is the general policy of Manager and all RICs in the Company Group to make the section 853(a) election for each RIC in any year that the RIC qualifies for the election. Therefore, Manager has an established procedure to ensure that section 853(a) elections are timely made for all qualified RICs, including Taxpayer. Specifically, after a RIC's fiscal year end, an evaluation is done to determine whether, for the tax year, more than 50 percent of the value (as defined in section 851(c)(4)) of the RIC's total assets consists of stock or securities in foreign corporations as required under section 853(a)(1). If this requirement is met, a notation is made in the tax provision workpapers for that RIC to ensure that the section 853(a) election is timely made with the RIC's timely-filed Form 1120-RIC, *U.S. Federal Income Tax Return for Regulated Investment Companies*. These workpapers are then transmitted to Contractor, which is engaged to prepare the tax return and the election. Contractor prepares the return, with the section 853(a) election, and transmits it to the RIC for review, signature, and filing.

Manager's established procedure was designed primarily for RICs that consistently exceed the 50 percent foreign asset requirement under section 853(a)(1). However, Taxpayer's assets in foreign securities do not always constitute more than 50 percent of Taxpayer's total assets. Thus, while Taxpayer's assets were tested for section 853(a) qualification soon after its fiscal year ended Date 1, and found to exceed the 50 percent foreign asset requirement under section 853(a)(1), Manager decided to

test Taxpayer's qualification again at the end of the calendar year when information would be prepared for Form 1099-DIV, *Dividends and Distributions*, reporting to Taxpayer's shareholders. This would provide Manager with greater certainty of Taxpayer's qualification under section 853(a) given that the financial results of Taxpayer would be fixed at that time. As a result of the deferral of certification, however, in Date 4, no notation was made in Taxpayer's tax provision workpapers to make the section 853(a) election. It was intended that such notation would be made at the time the final qualification was determined, and the Forms 1099-DIV would be issued for the year passing through the foreign tax credits.

At the end of the calendar year, Taxpayer's assets were tested and found again to meet the 50 percent foreign asset requirement under section 853(a)(1). At this time, it was decided that Taxpayer should make a section 853(a) election for the taxable year ended Date 1. Consistent with Taxpayer's intention to make the section 853(a) election, in Date 5, Taxpayer sent the foreign source income and foreign tax credit information to its brokers and Agent. Agent provides shareholder and administrative services to Taxpayer and is responsible for providing tax reporting services, including reporting on Forms 1099-DIV, to shareholders and the Internal Revenue Service ("Service"). Agent passed through Taxpayer's foreign tax credits to its shareholders for its taxable year ended Date 1 consistent with Taxpayer having made a timely section 853(a) election for that year.

The intention to make the section 853(a) election, however, was inadvertently not reflected in the tax provision workpapers for Taxpayer. Additionally, the Form 1120-RIC and the Form 1099-DIV reporting are separate processes, and, therefore, the Form 1099-DIV reporting process that reflected Taxpayer's intention to make the section 853(a) election did not carry over onto the tax provision workpapers. Therefore, Contractor was not aware of Taxpayer's intention to make the section 853(a) election when preparing Taxpayer's Form 1120-RIC. Additionally, Taxpayer had not qualified to make the section 853(a) election in prior tax years. Thus, Contractor did not question the absence of any notation in the tax provision workpapers and presumed that Taxpayer did not intend to make the section 853(a) election for its taxable year ended Date 1. Contractor therefore prepared Taxpayer's Form 1120-RIC without a Form 1118, *Foreign Tax Credit—Corporations*, making the section 853(a) election. Because Contractor was not involved in the Form 1099-DIV process, the Form 1120-RIC claimed the foreign tax payments on behalf of Taxpayer in contrast to the Form 1099-DIVs that reflected the foreign tax credits passing through to the shareholders consistent with a timely section 853(a) election. When Taxpayer reviewed the Form 1120-RIC, it also did not identify the missing section 853(a) election because Taxpayer had not previously made this election and because there was no notation in the tax provisions workpapers.

On or around Date 6, Manager reviewed prior year tax returns and discovered that Taxpayer's Form 1120-RIC for the taxable year ended Date 1 did not contain a Form 1118 making the section 853(a) election. Manager informed Taxpayer who discussed this matter with Contractor to determine the appropriate method of correction.

Based on these discussions, it was determined that the best course of action would be to submit a request for an extension of time under sections 301.9100-1 and 301.9100-3 to allow Taxpayer to file Form 1118 and make a section 853(a) election for the taxable year ended Date 1. Taxpayer represents that it will correct its Form 1120-RIC for taxable year ending Date 1, in accordance with making the section 853(a) election.

Taxpayer makes the following additional representations in connection with its request for an extension of time:

1. The request for relief was filed before the failure to make the regulatory election was discovered by the Service.
2. Taxpayer does not seek to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 of the Code at the time Taxpayer requested relief and the new position requires or permits the regulatory election for which relief is requested.
3. Being fully informed of the required regulatory election and related tax consequences, Taxpayer did not choose to not file the election.
4. Taxpayer is not using hindsight in making the decision to seek the relief requested. No specific facts have changed since the due date for making the election that make the election advantageous to Taxpayer.
5. Granting the relief requested will not result in Taxpayer having a lower U.S. federal tax liability in the aggregate for all years to which the election applies than Taxpayer would have had if the election had been timely made (taking into account the time value of money).
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer for the taxable year in which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had the election been timely filed.

In addition, affidavits on behalf of Taxpayer have been provided as required by sections 301.9100-3(e)(2) and (3).

#### LAW AND ANALYSIS

Section 853(a) provides that a RIC, more than 50 percent of the value (as defined in section 851(c)(4)) of whose total assets at the close of the taxable year consist of stock or securities in foreign corporations, and which meets the requirements of section 852(a) for the taxable year, may for such taxable year, elect the application of section 853 with respect to certain taxes paid by the RIC during the taxable year to foreign countries and possessions of the United States.

Section 853(b)(1) provides that the electing RIC (A) shall not, with respect to such taxable year, be allowed a deduction under section 164(a) or a credit under section 901 for taxes to which section 853(a) is applicable, and (B) shall be allowed as an addition to the dividends paid deduction for such taxable year for the amount of such taxes.

Section 853(b)(2) provides that each shareholder of the electing RIC shall (A) include in gross income and treat as paid by the shareholder its proportionate share of these taxes, and (B) treat as gross income from sources within the respective foreign countries and possessions of the United States the sum of the shareholder's proportionate share of such taxes and the portion of any dividend paid by the RIC which represents income derived from sources within foreign countries or possessions of the United States.

Section 853(c) provides that the amount to be treated by a shareholder of the electing RIC as the shareholder's proportionate share of taxes paid to any foreign country or possession of the United States, and gross income derived from sources within any foreign country or possession of the United States, shall not exceed the amounts so reported by the RIC in a written statement furnished to such shareholder.

Section 1.853-4(b) of the Income Tax Regulations provides that an election under section 853 must be made not later than the time prescribed for filing the return (including extensions). The election, once made, is irrevocable with respect to the dividend (or portion thereof), and the foreign taxes paid with respect thereto, to which the election applies.

Section 1.853-4(c) requires an electing RIC to provide certain information, including, among other things, the date, form, and contents of the notice to its shareholders. Section 1.853-4(d) provides that the information described in section 1.853-4(c) shall, unless otherwise prescribed, be provided on or with a modified Form 1118, *Foreign Tax Credit—Corporation*, filed as part of the RIC's timely filed federal income tax return for the taxable year.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election to mean an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that

do not meet the requirements for an automatic extension under section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to section 301.9100-3 will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer generally is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under section 301.9100-3 before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith, however, if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under section 301.9100-3.

## CONCLUSION

Based on the information submitted and representations made we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to make an election under section 853 for its taxable year ended Date 1. Accordingly, Taxpayer has 90 days from the date of this letter to make its intended election.

This ruling is limited to the timeliness of the filing of the election in section 853 of the Code. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Taxpayer qualifies as a RIC under part 1 of subchapter M of chapter 1 of the Code or whether Taxpayer otherwise qualifies for an election under section 853. Furthermore, no opinion is expressed regarding the timeliness of, or tax consequences of amending, the Form 1120-RIC.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file in this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

---

Andrea M. Hoffenson  
Branch Chief, Branch 2  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

cc: